

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROTONDI INDUSTRIES CORP.	:	DETERMINATION DTA NO. 820414
for Revision of a Determination or for Refund of Sales	:	
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Period June 1, 2001 through November 30, 2003.	:	

Petitioner, Rotondi Industries Corp., 187 East Merrick Road, Valley Stream, New York 11580-5900, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 2001 through November 30, 2003.

The Division of Taxation, by its representative, Christopher C. O'Brien, Esq. (John E. Matthews, Esq., of counsel), brought a motion, filed August 17, 2005, seeking dismissal of the petition or, in the alternative, summary determination in this matter pursuant to 20 NYCRR 3000.5, 3000.9(a)(i) and 3000.9(b). On September 15, 2005, petitioner appeared by its representative, Barnard S. Mark, Esq., and submitted in response an affidavit in opposition to the Division's motion, beginning the 90-day period for issuance of this determination. After due consideration of the documents and arguments presented, Frank W. Barrie, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner filed a timely Request for Conciliation Conference with the Bureau of Conciliation and Mediation Services following the issuance of a Notice of Determination.

FINDINGS OF FACT

1. The Division of Taxation (“Division”) issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated May 14, 2004 against petitioner, Rotondi Industries Corp. (Assessment ID# L-023822279), asserting a total amount due of \$301,940.23 for the period June 1, 2001 through November 30, 2003, consisting of tax due of \$193,938.01 plus interest of \$41,437.23 and penalty of \$66,564.99. The Division, with its motion papers, provided proof of mailing on May 14, 2004 of this Notice of Determination consisting of (i) an affidavit dated August 2, 2005 of Bruce Peltier, the mail and supply supervisor of the staff of the Division’s mail processing center, and (ii) an affidavit dated July 26, 2005 of Geraldine Mahon, the principal clerk of the Division’s Case and Resource Tracking System (“CARTS”).

2. The affidavit of Geraldine Mahon sets forth the Division’s general practice and procedure for processing statutory notices. According to Ms. Mahon, she receives from CARTS (i) a “certified mail record” consisting of a computer printout entitled “Certified Record for Presort Mail, Assessments Receivable” and (ii) corresponding notices. The notices are predated with the anticipated date of mailing. Each notice is assigned a “certified control number” which is recorded on a separate one-page “Mailing Cover Sheet” which also bears a bar code, the taxpayer’s mailing address and a Departmental return address on the front and taxpayer assistance information on the back. The “certified control number” is also listed on the certified mail record under the first heading entitled “Certified No.” The assessment numbers are listed under the second heading entitled “Reference No.” The names and addresses of the taxpayers are listed under the third heading, entitled “Name of Addressee, Street and PO Address.” Ms. Mahon’s affidavit further states that she examined the certified mail record issued by the Department of Taxation and Finance on May 14, 2004 which establishes that a Notice of

Determination with “Notice Number L-023822279” was sent to “Rotondi Industries Corp., 187 E Merrick Rd., Valley Stream, NY 11580-5900” by certified mail using control number “7104 1002 9730 0067 5013.” The United States postmark on each page of the certified mail record, including page five of the certified mail record on which the Notice of Determination at issue appears, confirms that such notice was sent on May 14, 2004. It is also observed that this control number “7104 1002 9730 0067 5013” appears on the mailing cover sheet for Notice Number L-023822279 issued against petitioner.

3. The affidavit of Bruce Peltier, the mail and supply supervisor in the Division’s mail processing center, describes the operations and procedures followed by the mail processing center. Mr. Peltier states that the notices are received by the mail processing center in an area designated for “Outgoing Certified Mail.” Each notice is preceded by a Mailing Cover Sheet. A member of his staff retrieves the notices and operates a machine that puts each statutory notice into a windowed envelope so that the address and certified number from the Mailing Cover Sheet shows through the window. The staff member then weighs, seals and places postage on each envelope. The envelopes are counted and the names and certified mail numbers are verified against the information contained on the certified mail record. A member of the mail processing center then delivers the envelopes and the certified mail record to one of the various branch offices of the U.S. Postal Service (“USPS”) located in the Albany, New York area. A postal employee affixes a postmark and also may place his or her signature on the certified mail record indicating receipt by the post office. The USPS has further been requested by the mail processing center to either circle the number of pieces received or indicate the total number of pieces received by writing the number of pieces on the mail record. A review of the certified mail record listing the pieces of certified mail delivered to the USPS by the mail processing

center staff on May 14, 2004 confirms that a USPS employee initialed pages 1 through 7 of the certified mail record, affixed a postmark to each page of the certified mail record, and wrote 66 as the total number of pieces of certified mail received.

4. An examination of the envelope in which petitioner mailed its request for conciliation conference shows that it was mailed at Valley Stream, New York 11580 on October 18, 2004 as indicated by the postal markings on the envelope. Ninety days from the date of mailing of the notice of determination at issue is August 22, 2004. The request for conciliation conference mailed on October 18, 2004 was therefore mailed 57 days late.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides that a notice of determination of additional sales tax due shall be an assessment of the liability determined after ninety days from the mailing of the notice “except only for any such tax . . . as to which the taxpayer has within such ninety day period applied to the division of tax appeals for a hearing” In lieu of an application to the Division of Tax Appeals for a hearing, the taxpayer has the alternative of filing a request for a conciliation conference since, under Tax Law § 170.3-a(b), “A request for a conciliation conference . . . shall suspend the running of the period of limitations for the filing of a petition protesting such notice and requesting a hearing.” Consequently, a notice of determination of additional sales tax due does not become an assessment of the liability determined if the taxpayer within 90 days from the mailing of the notice files a request for conciliation conference. If a taxpayer fails to file a timely challenge by requesting a conciliation conference or a hearing within 90 days of the mailing of the notice of determination, the Division of Tax Appeals is precluded from hearing the case, having no jurisdiction over the matter (*see, Matter of American Woodcraft, Inc.*, Tax Appeals Tribunal May 15, 2003).

B. Here, the Division has offered adequate proof, as detailed in Findings of Fact “2” and “3”, to establish the mailing of the statutory notice on the same date that it was dated, i.e., May 14, 2004. The affidavits submitted by the Division adequately describe the Division’s general mailing procedure as well as the relevant mailing record and thereby establish that the general mailing procedure was followed in this case (*see, Matter of Deweese*, Tax Appeals Tribunal, June 20, 2002). Given the postmark on petitioner’s request for a conciliation conference, it may be concluded that it was mailed 57 days late. Consequently, the Division of Tax Appeals has no jurisdiction over this matter (*see, Matter of American Woodcraft, Inc., supra*). Even *one* day late precludes a taxpayer from having a petition heard since deadlines for filing petitions are strictly enforced (*see, Matter of Maro Luncheonette, Inc.*, Tax Appeals Tribunal, February 1, 1996).

C. A motion for summary determination may be granted,

if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]).

Petitioner contends that it is entitled to a hearing at which it can have the opportunity to establish that petitioner’s president, Arthur L. Rotondi, “personally prepared, signed and dated a Request for Conciliation Conference on August 8, 2004 and the Request, along with four (4) other pages comprising a portion of the Notice of Determination were stamped and set aside for postal pickup on the following day” by presenting the testimony of Mr. Rotondi. Petitioner further argues that petitioner should be permitted “to solicit the testimony of the postal carrier and/or postal authority representatives to address the issue of the alleged lack of the [timely] delivery of the subject Request”

D. The Division's motion for summary determination, on the basis that the Division of Tax Appeals has no jurisdiction over this matter because petitioner failed to file a timely Request for Conciliation Conference, is properly granted. In New York, testimony is simply "insufficient, as a matter of law, to prove timely filing" (*Matter of Dattilo*, Tax Appeals Tribunal, May 11, 1995, **confirmed** 222 AD2d 28, 645 NYS2d 352). The only evidence that would meet petitioner's burden to prove that it timely contested the notice of determination is a postal receipt for certified or registered mail (*see, Matter of Seguin*, Tax Appeals Tribunal, October 22, 1992). This is especially so given the postmark of October 18, 2004 on the envelope in which the request for a conference was mailed, or 57 days late. The Tribunal in *Matter of Seguin* (*supra*) affirmed the administrative law judge's determination which noted with approval the reason for this strict rule of evidence as articulated in the Federal Tax Court as follows:

In *Storelli v. Commissioner* (86 TC 443), the Tax Court emphasized the following insightful and persuasive point made in *Wood v. Commissioner* (41 TC 593, *affd* 338 F2d 602):

"[U]nless taxpayers are held to strict proof [postal receipt for certified or registered mail], the temptation would be great to conveniently misplace the sender's receipt for certified mail and attempt to prove by virtually uncontestable oral testimony of the sender, who would in most cases be prejudiced, that the receipt was postmarked on time."

Consequently, petitioner's contention that the Division's motion for a summary determination should be denied so as to provide it with the opportunity to present at hearing the testimony of its principal and a representative of the United States Postal Service is rejected since such testimony cannot as a matter of law establish the timely filing of its request for a conciliation conference.

E. Finally, it is observed that with the 1996 amendment to Tax Law § 1138(a)(1), effective on or after January 1, 1997, the notice of determination at issue here is no longer treated as "finally and irrevocably fixing the tax" so that petitioner is not without some remedy

(*see*, L 1996, ch 267). It may pay the tax, and file a claim for refund. If the refund claim is disallowed, it may then seek to petition the Division of Tax Appeals or request a conciliation conference in order to contest such disallowance.

F. The Division's motion for summary determination is granted, and the petition of Rotondi Industries Corp. is dismissed.

DATED: Troy, New York
October 13, 2005

/s/ Frank W. Barrie
ADMINISTRATIVE LAW JUDGE